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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

ROBERT MALANCHE, Petitioner,

v.

AMERICAN MOTORS CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Francisco M. Camacho
Attorney for
Petitioner
P. O. Box 161
Milwaukee, WI 53201
(414) 645-5020

February 17, 1981

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No. _____

ROBERT MALANCHE, Petitioner,

v.

AMERICAN MOTORS CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

A. Whether a Writ of Certiorari should issue from this court to the United States Court of Appeals for the Seventh Circuit.

B. Whether it was proper to grant respondent's motion for summary judgment

and to deny petitioner's motion for summary judgment and dismiss petitioner's cause of action.

C. Whether the court correctly assessed the standard of burden of proof by which respondent was to articulate a legitimate non-discriminatory reason for rejecting petitioner's work application in rebutting petitioner's prima facie case of discrimination based on petitioner's national origin.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit to which certiorari should be directed was issued on June 27, 1980 (see Appendix 1a). The decision from the United States District Court for the Eastern District of Wisconsin is set forth in Appendix 7a .

On December 30, 1977 the said District Court rendered a decision granting summary

judgment for respondent on the pleadings. Petitioner appealed and the Seventh Circuit Court of Appeals vacated that judgment and remanded the case for a trial on the merits. However, the latter two decisions are not involved in this appeal.

JURISDICTION

This court is asked to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered and entered on June 27, 1980. A petition for rehearing was duly filed with the said United States Court of Appeals for the Seventh Circuit, but that court denied it on November 17, 1980.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1) because the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of

this court's power of judicial supervision. The questions presented herein are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, etc. The complete text of the statutory provisions pertinent to this petition is set forth at Appendix 24a.

STATEMENT OF THE CASF

Petitioner is a naturalized citizen, born in Mexico, living in the United States since 1923. Petitioner worked for respondent in 1958 for a month, but was fired for alleged absenteeism.

From 1958 to August 7, 1972 petitioner worked as a skilled welder at various industries within the respondent's commun-

ity. Throughout this time petitioner re-applied for employment with respondent, but each time the latter told him that his application could not be processed because it had been misplaced or lost and thus Petitioner was forced to reapply each and every time. Finally, on August 7, 1972, he sought outside assistance to trace his re-submitted application. It was then that he was told that he could not be hired because of his prior work record dating back to 1958. There were mitigating circumstances surrounding that discharge, to wit: because of his national origin, petitioner suffered verbal and physical abuse at respondent's work environment, and in one instance respondent advised petitioner to stay away from the plant so that the matter could be investigated, except that upon petitioner's return three days later respondent advised him that he no longer had a job because of his absence.

The application of petitioner filed on August 7, 1972 was a standard application used by respondent. On its face petitioner showed more than eight years of experience as a skilled welder. He sought entrance into the skilled trades as a welder, which was divided into journeyman and changeover new employees with less qualifications, of only 2-8 years experience, where there were no journeymen available. The standard procedure employed by respondent to hire skilled tradesmen was as follows: An application is submitted for a skilled trades job. If the application on its face states the required skills and is otherwise complete, respondent grants the applicant an interview. After the interview the applicant is required to document his journeyman status or its equivalent of eight years, depending on whether he is being hired as a changeover new employee, in which case the qualifications are less

than eight years. A job offer is made contigent upon that after the interview.

In fact, there were non-Mexican applicants who did not submit this documentation prior to commencing actual employment; thus the only flexibility in this procedure was after the interview. But never was there a case where documentation was required prior to considering an application and being interviewed except in petitioner's case.

From August 7, 1972 to February 25, 1974 respondent hired ten non-Mexican skilled tradesmen, six of whom were less qualified than petitioner and nine of whom submitted their applications after petitioner submitted his. Some applicants did not submit their documentation in support of their skill assertions until after they commenced actual employment.

Respondent had no written policy concerning when it would rehire employees

previously dismissed, except that they were readily reemployed, including one who had been fired for misconduct--theft. However, petitioner was the only person on record whom respondent refused to hire because of absenteeism, replete with mitigating circumstances fourteen years prior to August 7, 1972, as aforesaid. It was only when petitioner began going personally to respondent's premises requesting information as to why his application had not been acted upon, (February 2, 1973) that he learned that he would not be hired because of his record of dismissal fourteen years prior thereto. Two meetings took place between respondent and petitioner (February 2, 1973 and again in late 1973), but no request was made at any time for petitioner to first submit documentation supporting his skills for a journeyman status prior to considering his application.

By March 20, 1973, respondent had

even gone so far as to hire a private investigator to scrutinize and research each and every assertion made by petitioner in his application of August 7, 1973. The report sustained petitioner's assertions made in his application and, in fact, found that petitioner was well qualified as a skilled welder and that he had been an asset to all of his employers.

Petitioner had at all times been ready, willing and able to comply with all requirements of respondent as to his application and in fact upon being informed for the first time on February 4, 1974 that his work experience would have to be supported by appropriate affidavits from his previous employers prior to a consideration of his application, he promptly complied by February 25, 1974 and was hired on June 6, 1974.

Petitioner is the first journeyman of Mexican national origin ever hired by re-

spondent, prior to June 6, 1974 and up to the date of filing this petition he is still employed as such by respondent.

The basis for federal jurisdiction in the court of first instance was invoked by petitioner pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. A second claim (pursuant to 42 U.S.C. § 1981 (1970) providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States) was asserted by petitioner in his complaint, but this claim is not at issue here, for purposes of this petition.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

A. A WRIT OF CERTIORARI SHOULD ISSUE FROM THIS COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BECAUSE THE TRADITIONAL RULES OF JURISPRUDENCE WERE NOT UTILIZED BY THAT COURT IN DETERMINING

WHETHER THE DISTRICT COURT ERRED IN GRANTIN(RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHILE DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT. FURTHER, THERE WAS AN IMPROPER ANALYSIS OF THE APPLICABLE CASE LAW RELATIVE TO THE FIELD OF EMPLOYMENT AS TO PETITIONER ESTABLISHING A PRIMA FACIE CASE AND THE ATTENDANT BURDEN OF PROOF UPON RESPONDENT TO REBUT THE SAME.

In determining whether to grant petitioner's Writ of Certiorari, this court can readily observe that there is nothing in the decisions of either the District Court or the United States Court of Appeals for the Seventh Circuit from which this court may judge the legal foundations for their respective decisions. Certainly the Seventh Circuit's rationale should have included the following analytical cornerstones of the American jurisprudence, to wit: that summary judgment is a drastic remedy and is never warranted except on a clear showing

that no genuine issue as to any material fact remains; that all factual inferences have been drawn in the light most favorable to petitioner; that petitioner should have been given the benefit of all reasonable doubts in determining whether genuine issues of fact existed; that petitioner's version of th facts established at trial were to be accepted as true for purposes of respondent's motion; and that the standard for appellate review in this case is much broader than is normally the case because the factual determinations petitioner seeks arise primarily from drawing inferences from undisputed facts or in determining their legal implications; and there is nothing in the record of the Seventh Circuit as to the burden of proof it, or the District Court, attributed to petitioner in attempting to establish a prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); Furnco Construction Corp. v.

Waters, 438 U.S. 567 (1977); Board of Trustees v. Sweeny, 439 U.S. 24 (1978); Free v. Bland, 369 U.S. 663 (1961); Flowers v. Crouch-Walker Corp., 552 F. 2d 1277 (7th Cir. 1977)

Certainly all inferences from the facts were impermissibly drawn in favor of respondent. There is no dispute that petitioner was qualified on August 7, 1972, when he submitted his application and that had he been allowed to follow the normal procedures, he would have established his qualification (of which respondent already knew as of March 20, 1973, when its private investigator rendered his report as to petitioner's qualifications). However, the District and the Circuit Courts imply that an objective, non-discriminatory practice was followed as to petitioner's application. The fact is that petitioner was the only one who was subjected to the condition-precedent of proving conclusively that he was

in fact qualified prior to even considering his application. Furthermore, they did not even tell him of such prerequisite. This is certainly disparate treatment because petitioner was singled out and it is this invidious discrimination that the Statute seeks to abolish from this great country of ours. Certainly respondent may refuse to consider an applicant if he fails to submit evidence of his qualifications, but only if this criterion is used with all applicants regardless of national origin. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1972).

In establishing the second justification for denying timely employment to petitioner the District Court, as affirmed by the Seventh Circuit, erroneously infers that petitioner stipulated that respondent followed a normal hiring procedure (inferentially), vis-a-vis petitioner's application. This is certainly not true and, as observed a-

bove, petitioner's application was singled out for disparate treatment because of his national origin.

In establishing the first justification for abridging the rights of petitioner the court further states that the fact that petitioner had been previously dismissed by the respondent (fifteen years prior to August 7, 1972). However, the record is abundantly clear that petitioner again received disparate treatment in not being rehired as was the normal policy of respondent, albeit not a written policy, as applied to other applicants. But, then, the District Court concludes, because of petitioner's good work record for fifteen years, his prior dismissal could no longer be considered a legitimate justification for failing to rehire him on August 7, 1972. Thus, where is the justification for the court granting respondent's motion for summary judgment? The conclusion that petitioner did not make

a prima facie case is not supported by the facts established by petitioner at Trial.

B. IT WAS ERROR TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND TO DENY PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DISMISS PETITIONER'S CAUSE OF ACTION

The discussion above centers on the impermissible inferences drawn by the District Court and the Court of Appeals for the Seventh Circuit in granting respondent's motion for summary judgment. While the law with respect to summary judgments is a unique one in the field of employment discrimination, yet this section will demonstrate that petitioner was entitled to summary judgment and that, at the very least, he was entitled to "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." Board of Trustees v.

Sweeny, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, at 805 (1972).

In applying the standard of McDonnell Douglas v. Green, supra, to establish a prima facie case for discrimination on the basis of national origin, petitioner had to establish (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (footnote omitted) McDonnell Douglas Corp. v. Green, supra at 802.

(i) By stipulation, petitioner established at trial that he was a member of a racial minority;

(ii) petitioner did apply for and was qualified for the job in question. Here is the issue that troubled the lower courts. Both courts assumed that petitioner had to establish his qualifications as a condition precedent to being hired, but the overwhelming evidence shows that respondent meant not to hire petitioner solely because of his previous work record (which the court found as not constituting a legitimate justification for not hiring him). If in fact petitioner had to first conclusively prove that he was qualified for the job prior to consideration of his application, then the respondent should have affirmatively and clearly communicated this to petitioner and petitioner would have complied, because it was his dream to work for respondent and he was in fact qualified at the time of his application. Thus the Court of Appeals erred in placing that great burden on petitioner to know what was in the minds of re-

spondent as to the procedure to be followed on his application for employment. But then, if this is true(that he must first prove that he is qualified), then he is being singled out and this is the crux of discrimination prhibited by the statutes in question, because other non-Mexican applicants did not have to submit conclusive evidence of being qualified until after the interview, and some not until they were actually hired.

(iii) Despite petitioner's qualifications, he was rejected for employment by respondent. Petitioner showed at trial that between August 7, 1972 and February 28, 1974, respondent hired ten skilled trade welders, six of whom were less qualified than petitioner and nine of whom submitted their applications after petitioner did. Those with less qualifications were hired as changeover new employees. Petitioner filled out his application under the general head-

ing of "Skilled Trades" so that he would be eligible for the changeover new employee position, if a journeyman's position was not then available. But then the court impermissibly drew the inference that respondent assumed that petitioner was interested only in a journeyman's position. This is not substantiated by the record and all reasonable inferences must be drawn in favor of petitioner in a summary judgment procedure, as is the case at bar.

(iv) The record does not establish a legitimate, non-discriminatory reason for respondent's failure to hire petitioner between August 7, 1972 and February 28, 1974. As stated above, the court did set forth two justifications categorized as legitimate non-discriminatory reasons for rejecting petitioner's application during the period of time in question. One of those reasons was discredited by the District Court and the other had no rationale in the evidence

presented in this case. The justification that petitioner had been dismissed fifteen years prior to August 7, 1972 was dispelled by the court's own holding and the actual policy of respondent not to hire that class of applicants was non-existent or was one of hiring them, as the record so shows, except in the case of petitioner's. The other alleged justification, whether the petitioner was qualified prior to considering his application, was never applied to any other non-Mexican applicant and thus, if it is held to apply to petitioner, this is in itself discriminatory.

C. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT NEVER ARTICULATED THE BURDEN OF PROOF BY WHICH PETITIONER WAS TO MAKE A PRIMA FACIE CASE, NOR DID IT CONSIDER BY WHICH STANDARD OF PROOF RESPONDENT WAS TO ARTICULATE A LEGITIMATE REASON FOR REJECTING PETITIONER'S WORK APPLICATION

IN REBUTTING PETITIONER'S PRIMA FACIE CASE OF DISCRIMINATION BASED ON PETITIONER'S NATIONAL ORIGIN.

The burden of proof the United States Court of Appeals for the Seventh Circuit imposed upon petitioner in establishing a prima facie case was never made known in its decision and the cases cited in this petition do not help either, except for the case of Flowers v. Crouch-Walker Corporation, 552 F. 2d 1277 (7th Cir. 1977), which seems to infer that the employer must rebut the prima facie case of illegal discrimination by clear and convincing evidence. The case of Furnco Construction Corp. v. Waters, 438 U.S. 567 (1977) further explains the holding of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972), and was further modified in Board of Trustees of Keene State College, et al. v. Sweeny, 439 U.S. 24(1978). but the question of the standard for the burden of proof each respective party car-

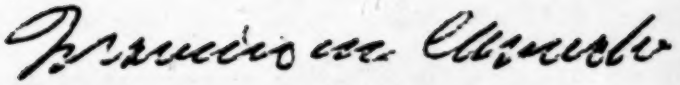
ries in establishing a prima facie case and in rebutting it and the further rebuttal by petitioner in establishing that the reasons for rejection were in fact mere pretexts. Therefore, this court must grant this petition to resolve the above stated questions.

CONCLUSION

For the reasons stated above, this petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit must be granted with direction to enter summary judgment in favor of petitioner, and to vacate the order and judgment of the United States Court of Appeals for the Seventh Circuit.

Dated this 15th day of February, 1981,

at Milwaukee, Wisconsin.



Francisco M. Camacho
Attorney for Petitioner
P. O. Box 161
Milwaukee, WI 53201
(414) 645-5020

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Argued May 5, 1980
CORRECTED: June 30, 1980
June 27, 1980

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM G. EAST, Senior District Judge*

ROBERT MALANCHE, Plaintiff-Appellant,	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79-2458 vs.	No. 76-C-258
AMERICAN MOTORS CORPORATION, Defendant-Appellee	Myron L. Gordon, Judge

O R D E R

In this suit filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17, plaintiff Robert Malanche appeals from a judgment in favor of defendant American Motors Corporation ("AMC"). We agree with the district court's conclusion that plaintiff has failed to establish a prima facie case of discrimination in delay in hiring based on national origin. Accord-

*The Honorable William G. East, United States Senior District Judge for the District of Oregon, sitting by designation.

ingly, we affirm.

For purposes of this appeal, the facts of this case may be briefly stated. Plaintiff is a naturalized citizen of Mexican descent who has lived in the United States since 1923. Plaintiff worked for AMC for a month in 1958 when he was fired for absenteeism. On August 7, 1972 Malanche applied for reemployment at AMC as a journeyman maintenance welder. AMC"s collective bargaining agreement with the company's union, Local 72 of the United Auto Workers, requires that an applicant for a journeyman welder position must provide proof of journeyman's status before hiring. According to the terms of the bargaining pact, this could be accomplished either by presenting a valid journeyman's card or by supplying affidavits certifying eight years of practical welding experience. It is the normal practice of AMC to request this documentation after the applicant has interviewed with a skilled trade superintendant.

On February 2, 1973 Robert Bilger, an executive board member of the union, and plaintiff's former attorney, Lynn Adelman, contacted Merril Schroeder, an AMC placement coordinator, urging that plaintiff be hired as a journeyman welder. Adelman also spoke to Emmit Haycraft, AMC"s assistant director of industrial relations, regarding plaintiff's application. In a letter to Haycraft dated February 9, 1973, Adelman stated he would "try and get some documentation" of journeyman status from plaintiff and would "be in touch with (Haycraft) as soon as possible concerning the documentation of Mr. Malanche's work credentials." Some time in 1973 plaintiff and the president of the union, Ralph Davin, met with Larry Sladek, AMC employment supervisor. At that meeting

plaintiff was informed again that he needed to document his journeyman status. Up to and including this time plaintiff's August 1972 application for reemployment had not yet been processed by AMC and no interview had been scheduled.

On August 14, 1973 Malanche filed a charge of employment discrimination both with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations and the Equal Employment Opportunities Commission ("EEOC"). After investigating the charge, Robert Junceau, an employee of the state agency, wrote to plaintiff advising him to submit the affidavits of his prior welding experience. Three weeks later, on February 25, 1974, plaintiff furnished the required affidavits to AMC. On February 28, 1974 AMC began processing plaintiff's application, and he was eventually hired as a journeyman welder.

On April 14, 1976 plaintiff filed this suit in the district court against AMC, after receiving his "right to sue" letter from the EEOC, alleging wrongful discrimination by AMC's delay in hiring him and requested back pay as relief. The alleged discrimination was to have occurred between February 14, 1973, when AMC hired its first journeyman welder after plaintiff's application had been submitted, and February 28, 1974, when plaintiff was advised to report for a preemployment physical. During this twelve-month period AMC hired ten welders, both as journeymen and changeover new employees. In his complaint plaintiff contends that AMC unlawfully deviated from its normal hiring practice by requiring him to produce proof of journeyman welder status prior to the initial processing of his application and conducting of an interview. AMC asserted that it was justified

in not acting on plaintiff's application until the affidavits were submitted on two grounds: his previous termination for absenteeism and the communications between AMC and Malanche's attorney and the union which led AMC to believe the affidavits would be furnished by plaintiff within a short time.

On December 30, 1977 the district court granted defendant's motion for summary judgment. On appeal this court vacated that order and remanded the case for trial to resolve the issue of whether AMC discriminated against Malanche by requiring his affidavits before an interview. Following a two-day trial the district court dismissed plaintiff's case on November 6, 1979.

On appeal plaintiff raises two issues which merit discussion. First, Malanche contends the district court erred in holding that he failed to establish a prima facie case of employment discrimination based on national origin. We agree with plaintiff that the case of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), controls this issue. According to McDonnell-Douglas, a Title VII plaintiff establishes a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. In the instant case the district court concluded that plaintiff's failure to furnish affidavits certifying

his welding experience until February 25, 1974, was fatal to establishing a prima facie case. We agree. Absent this certification, plaintiff could not have been considered a qualified applicant under the second criterion stated above. Contrary to plaintiff's assertions, we find that the deviation which occurred in the hiring process--by requiring plaintiff to supply the affidavits before the interview--was justified both by Malanche's prior work record at AMC and by the discussions resulting from the repeated intervention by persons urging Malanche's reemployment with AMC. Moreover, the record amply supports the fact that plaintiff was aware of the need to document his welding ability before he could be considered for the job, and was so informed on numerous occasions by his attorney, union officials, and Junceau's letter of February 4, 1974.

Second, Malanche argues that AMC was obligated to offer him any available welding job, if not as a journeyman then as a changeover new employee. Under the facts of this case, however, we find that AMC was justified in assuming that Malanche was interested only in journeyman status. As the record indicates, AMC, Adelman, and Junceau all believed that plaintiff was applying for work as a journeyman welder. Plaintiff never requested a job as a changeover new employee. Although his application was labelled "skilled trades," which included both journeymen and changeover new employees, under the circumstances it was reasonable for AMC to treat his application as one for a journeyman position. AMC had no duty to offer plaintiff employment until he furnished the affidavits of his welding experience.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 17, 1980

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge

ROBERT MALANCHE, Plaintiff-Appellant, No. 79-2458 vs. AMERICAN MOTORS CORPORATION, Defendant-Appellee.	Appeal from the United States District Court for the Eastern District of Wisconsin No. 76-C-258 Judge Myron L. Gordon

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled case by the plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

*Honorable William G. East, Senior District Judge from the United States District Court in Oregon, is sitting be designation.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBERT MALANCHE,

Plaintiff,

v. No. 76-C-258

AMERICAN MOTORS CORPORATION,

Defendant.

DECISION and ORDER

This matter is before me for resolution on its merits, following a two day trial to the court. The plaintiff, proceeding under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., seeks back pay to compensate him for the defendant's delay in hiring him which allegedly was a result of national origin discrimination.

For the purpose of Rule 52, Federal Rules of Civil Procedure, the court adopts as its findings of facts those facts to

which the parties stipulated in a statement filed on September 19, 1979, as well as those facts specifically alluded to in this opinion. The plaintiff Robert Malanche is a naturalized citizen of Mexican descent who has lived in the United States since 1923. The plaintiff had previously worked for the defendant, American Motors Corporation (AMC), from November 10, 1958, to December 10, 1958, when he was terminated for absenteeism.

On August 7, 1972, Mr. Malanche applied for reemployment at AMC as a journeyman maintenance welder. Pursuant to AMC's collective bargaining agreement with Local 72 of the United Auto Workers (UAW), before being hired as a journeyman, Mr. Malanche was required to prove his qualification for such a position by showing possession of a UAW journeyman's card or affidavits documenting eight years of practical experience in the trade for

which he applied.

On February 2, 1973, Robert Bilger, a member of the executive board of Local 72, and Mr. Malanche's attorney, Lynn S. Adelman, contacted Merril Schroeder, the AMC hourly placement coordinator regarding Mr. Malanche's application. Both Mr. Bilger and Mr. Adelman apparently urged that Mr. Malanche be hired as a journeyman welder.

Also on February 2, 1973, Mr. Malanche spoke with Mr. Schroeder regarding his application. According to Mr. Schroeder's "file memo" regarding his conversation with Mr. Malanche, their conversation focused on Mr. Malanche's previous dismissal from AMC in 1958. Mr. Schroeder told the plaintiff that he had not been rehired up to that point because of his earlier work record at AMC. Mr. Malanche in response explained that his 1958 dismissal had been a result of a personality conflict with a foreman.

On February 15, 1973, Mr. Adelman

spoke with Emmit Haycraft, AMC's assistant director of industrial relations, regarding Mr. Malanche's application. On February 19. 1973, Mr. Adelman wrote a letter to Mr. Haycraft summarizing his understanding of their conversation. His letter stated in pertinent part:

> "It is my understanding based on my conversation with you and based on previous conversations with Mr. Jack Schroeder and Mr. Lawrence Sladek (AMC's employment supervisor) that there are two problems with respect to your hiring (Robert Malanche). The first concerns his showing of some kind of proof of journeyman's status and the second involves your determination whether or not, under the unique circumstances present here, to hire Mr. Malanche despite his brief employment with your company.
>
> "Concerning the problem of journeyman status Mr. Malanche indicates to me that he either has such status or based on his experience as a maintenance welder he possesses the equivalent thereof. I have asked him to try and get some written documentation to this effect from either the union or his previous employer.

* * * *

"I will be in touch with you as soon as possible concerning the documentation of Mr. Malanche's work credentials."

On February 19, 1973, at Mr. Haycraft's direction, Mr. Sladek requested a Mr. Corrigan to make an investigation of Mr. Malanche's prior employment record. The report based on this investigation was received by Mssrs. Haycraft and Sladek on or about March 20, 1973.

On August 7, 1973, the plaintiff filed a charge of employment discrimination based on his national origin with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. This complaint was assigned to Robert Junceau for investigation. During the course of his investigation, Mr. Junceau spoke to both the plaintiff and Mr. Haycraft. At a meeting on December 6, 1973, Mr. Haycraft told Mr. Junceau that to that date Mr. Malanche still

had not furnished the necessary documentation of his journeyman's status. In a letter to Mr. Malanche dated February 4, 1974, Mr. Junceau stated:

> "On Friday afternoon I finally contacted Mr. Haycraft of AMC. He outlined the things you should do regarding the affidavits. First, you must get them notarized. If you do not it will only delay matters further. He said it would take about ten days to review them, and then they could give you a definite answer. So, go back to the companies involved and get them to give you the affidavits in the required form.
>
> Then, when you get them, send them by certified mail, return receipt requested, to:
>
> Emmit Haycraft
> Industrial Relations
> American Motors Corporation
> 5626 Twenty-Fifth Avenue
> Kenosha, Wisconsin 53140
>
> If, in addition, you are interested in production welding, ask him when you send the affidavits to send you an application for production welder. He said he could get you to work within 30 days." (emphasis in original)

On February 25, 1974, AMC received

notarized affidavits from Mr. Malanche. The affidavits were processed and approved by AMC and Local 72 on February 28, 1974, at which time Mr. Sladek wrote the plaintiff advising him to report for a physical.

The procedure followed by AMC in evaluating applications for skilled trade positions does not appear to be set out in any formal document or statement of company policy. However, the parties have stipulated that the company followed a "normal hiring procedure for skilled trades applicants." The procedure called for the skilled trades superintendent for a trade in which an opening existed to review applications for such a position in order to determine which applicants would be interviewed. Following an interview with the skilled trades superintendent, an applicant would be required to submit documentation of his journeyman status. A physical examination would then be scheduled.

In Mr. Malanche's case, AMC required that he document his journeyman status prior to any interview with the skilled trades superintendent.

While the plaintiff filed his application for a position as a journeyman maintenance welder on August 7, 1972, AMC did not hire for this position until February 14, 1973. Accordingly, the plaintiff contends that AMC discriminated against him from February 14, 1973, to February 14, 1974, when he was advised to report for a physical.

To resolve the issues in this case, the court must apply the standards set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). In that case the court stated that a prima facie showing of discrimination may be established by demonstrating:

> "(i) that (the plaintiff) belongs to a racial minority; (ii) that he applied and was

> qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove a legitimate non-discriminatory reason for its action. Id.

Mr. Melanche, a Chicano, made an application for a job, but he was not hired between February 14, 1973, and February 28, 1974; during that period the defendant hired ten individuals for the position of skilled trade maintenance welder. With regard to the establishment of a prima facie case, the issue is whether Mr. Malanche was a qualified applicant during the period in question.

The court of appeals for this circuit framed this issue in the following manner:

> "Malanche claims discrimination manifested by AMC's delay in hiring him. Therefore, he must prove that he was a qualified applicant at the time he claims that AMC first discriminated against him. If AMC could nondiscriminatorily require documentation before granting an applicant a full interview, then submission of such documentation would be an element of being a qualified applicant for purposes of establishing a prima facie case, and Malanche would not have satisfied that element."

AMC required Mr. Malanche to document his journeyman status at an earlier stage of the hiring process than would normally have been the case. As a result, the plaintiff was not "qualified" for the position he sought until he submitted affidavits regarding his experience on February 25, 1974. In my opinion, there are two non-discriminatory reasons which justified the delay in the processing of the plaintiff's employment application.

First, Mr. Malanche's previous employment with AMC had resulted in his dismissal

for absenteeism in 1958. While the record indicates that the company did not have a policy of absolutely prohibiting the rehiring of persons previously discharged, the testimony supported the conclusion that the rehiring of such persons often was the result of intervention on the part of union officials of AMC employees.

Mr. Malanche's previous dismissal was a non-discriminatory justification for AMC's failure to hire him initially. This reason was mentioned to Mr. Malanche when he spoke to Merril Schroeder on February 2, 1973, and it was also given to his attorney, Mr. Adelman when he spoke to Emmit Haycraft on February 15, 1973.

The report regarding Mr. Malanche's employment record between the time of his dismissal from AMC and his reapplication in 1972 demonstrated a good work record at each of his four positions. Thus, after the time this report was received at AMC,

in late March 1973, Mr. Malanche's dismissal from AMC fifteen years earlier no longer could be considered a legitimate justification for failing to rehire him.

There is, however, a second justification for the delay in hiring Mr. Malanche. While the "normal hiring procedure" of a skilled trade applicant involved an interview with the skilled trade superintendent prior to requiring documentation of journeyman status, Mr. Malanche's application procedure can hardly be characterized as normal.

Following the filing of Mr. Malanche's application, AMC officials were contacted by at least two union officials and Mr. Malanche's attorney regarding his application. Such contacts were not part of the normal application procedure. As a result of such contacts, I believe that it was reasonable for AMC officials to believe that Malanche would be submitting documen-

tation regarding his journeyman status as the next step in his application process.

This expectation is reflected in the following facts. In his letter to Mr. Haycraft dated February 19, 1979, Mr. Adelman stated he had asked his client to "try and get some written documentation" regarding his status. Furthermore, he added that he would "be in touch with you as soon as possible concerning the documentation of Mr. Malanche's work credentials."

Moreover, at some point during 1973, Mr. Malanche met with Mr. Sladek and Ralph Daum, president of Local 72. During that meeting, Mr. Daum and Mr. Sladek indicated to Mr. Malanche that he needed to document his journeyman status.

While the defendant had a procedure that it generally followed in handling skilled trade applications, this procedure was not mandated by any agreement, but rather it appears to have been the product

of routine. When people intervened on behalf of Mr. Malanche, the application in his case was no longer routine. Under such circumstances, I do not believe one can infer discrimination from the fact that usual procedures were not strictly followed.

Through their discussions with union officials, with Mr. Malanche and with his attorney, AMC officials were justified in waiting for Mr. Malanche to document his journeyman status before further processing his application. Moreover, in light of Mr. Adelman's letter of February 19, 1979, and Mr. Malanche's conversation with Mssrs. Daum and Sladek, it was entirely reasonable for company officials to believe that Mr. Malanche was aware that they expected him to document his journeyman status.

Emmit Haycraft informed the state equal rights investigator that AMC was awaiting such documentation before process-

ing the application. The investigator communicated this fact to Mr. Malanche who then transmitted the documents requested. Within three days thereafter, he was advised to report for a physical.

To summarize, the approximately one year's delay in hiring Mr. Malanche can be attributed to his failure to submit documentation regarding his journeyman status. I find no evidence of a discriminatory purpose in AMC's demand for proof of his past experience. The requirement of such documentation was justified in light of the communications among AMC officials, union officials, Mr. Malanche and his attorney. AMC's requirement of documentation was entirely fair and reasonable as was its expectation that Mr. Malanche intended to and would comply with such requirement. It follows that Mr. Malanche did not become "qualified" for the position which he sought until he in fact sub-

mitted his documentation on February 25, 1974. Thus, the plaintiff has failed to establish a prima facie case of discrimination against him based on national origin.

Therefore, IT IS ORDERED that the complaint of Robert Malanche against the American Motors Corporation be and hereby is dismissed, with costs.

Dated at Milwaukee, Wisconsin, this 2nd day of November, 1979

/s/ Myron L. Gordon
U. S. District Judge

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF WISCONSIN

ROBERT MALANCHE, CIVIL ACTION FILE NO. 76-C-258

Plaintiff,

vs. JUDGMENT

AMERICAN MOTORS CORPORATION,

Defendant.

This action came on for trial before the Court, Honorable MYRON L. GORDON, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the action is dismissed with costs awarded to the defendant.

Dated at Milwaukee, Wisconsin, this 6th day of November, 1979.

RUTH W. LA FAVE
Clerk of Court

by: Betty Michaelsen
Deputy Clerk

TITLE VII of the Civil Rights Act of 1964, as amended

42 U.S.C. §2000-e-2(a):

(a) It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; ...

42 U.S.C. §2000e-5(f)(3), (g)

(3) Each United States District Court... shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, ...

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice...

thoughts and process that I had while I was doing it.

Q. If Schroeder has a different understanding of the policy than you have, I take it you have higher rank than Schroeder; is that correct?

A. That is correct.

Q. So, your understanding of the policies and procedures would take precedence over Schroeder's?

A. Wait a minute. Phrase that again.

Q. That's a speculative question. Let me withdraw it. I don't think I should ask you that. Maybe I was just anticipating. Now I want you to tell me your policies and procedures relative to discharged employees. What does American Motors do relative to reemployment of discharged employees? What was your policy and procedures during the period '71 to '75?

A. Well, are you talking about skilled trades or are you talking about --

Q. No, let's just talk about unskilled trades. I don't want to get into the skilled trades. Assume somebody is working in the unskilled trades. They were discharged from American Motors. They want to reapply for a job in the skilled trades or in the unskilled trades.

A. They could apply.

Q. What was your policy relative to their applications?

A. It would depend on the circumstances under which they

were discharged.

Q. Depending on what circumstances? Somewhere you indicate what type of discharge or that certain people aren't eligible? Are there some categories of

discharge that are treated differently than others?

A. I can't recall right off the top of my head at this point.

Q. Do you know of persons that have been discharged from American Motors that have been reemployed.

A. Oh, yes.

Q. Do you know the kinds of things they were discharged for? Can you remember any specific instances?

A. Basically the ones that were reemployed were the absentee type employee who may have been discharged a year or two prior to reapplying and subsequently established a better work record with whoever he was working with while he was gone, or there may have been some mitigating circumstances in the case where he was discharged for absenteeism say a week ago, you know, depending on whatever mitigating circumstances might

be involved.

Q. Is there anything in writing relative to the policy on the rehire of discharged employees?

A. No, there isn't; not that I know of.

Q. Were the policies and procedures just kind of handed down to you from your predecessor in terms of how

(Witness complying.)

Q. Have you done so?

A. No.

Q. Are you still doing it?

A. I am still doing it.

Q. I'm sorry.

A. I have done so.

Q. Would you tell me which, if any, of the applications other than Mr. Malanche's indicates on its face that the applicant has had eight or more years' experience as a maintenance welder?

A. Yes, Mr. Gary Oswalt shows twenty years.

Q. As a maintenance welder?

A. Yes, sir.

Q. Would you tell me where his application -- this is Exhibit 26.

A. With the U.S. Army Hospital Motor Shop Welder.

Q. And would you consider that as being

the equivalent of a maintenance welder?

A. No, sir.

Q. What I am asking you is, which applicants -- which applications, if any, show on their face that the applicant had eight or more years' prior experience as a maintenance welder?

A. As a maintenance welder?

Q. That's what I said, yes.

A. I don't believe any of them do, eight or more years.

Q. Is it your understanding of the Collective Bargaining Agreement that one of the ways that an applicant could establish journeyman status would be to document through proper affidavits eight or more years previous experience as a maintenance welder?

A. Yes, sir.

Q. And it's your testimony that from the face of the applications the only one of the seven that I have shown you that would indicate eight or more years as a maintenance welder would be Malanche's application. Is that correct?

A. As written by the applicant, that is correct.

Q. Your purpose in ordering the Fidelifact investigation of Malanche was to ascer-

tain what his employment experience had been subsequent to his discharge from American Motors and prior to his reapplication.

A. Yes, sir.

Q. And I take it that you were interested in finding out whether he had established a record during that interim period as being a reliable and dependable employee; is that correct?

A. One of the reasons.

Q. And what was the other reason?

any consideration as far as the fact that this man had previously been discharged in 1958.

A. I don't recall when that judgment was made.

Q. I am not asking you when it was made; I am asking you now, today, looking at the various documents, do you think that it should have been eliminated as of the time that you read the Fidelifacts Report?

A. I don't think so.

Q. In other words, you think that there was still a legitimate basis for your questioning this man's reliability and dependability notwithstanding what was written in this Fidelifacts Report?

A. I think so.

Q. Did it ever occur to you, after reading the Fidelifacts Report, to contact either Malanche directly or Attorney Adel-

man and advise either Malanche or Adelman that if Malanche would submit documentation of his journeyman status, he would be given consideration for hire?

A. No, sir.

Q. Did it ever occur to you, after Malanche filed his discrimination complaint in August of 1974, that you might simply contact him or Adelman and advise them that if Malanche would document his journeyman status he would be considered or hire by American Motors?

A. Would you restate that question, please?

Q. All right. After Malanche filed his discrimination complaint -- First of all, I take it you were aware that he had filed this discrimination complaint.

A. Sure.

Q. Did it ever occur to you that you should simply contact him or Adelman

and tell Malanche or Adelman that if Malanche would submit documentation of his journeyman status, you'd hire him as a skilled trades maintenance welder?

A. No, sir.

Q. Never occured to you?

A. To contact either of the two gentlemen? Never occurred to me. No, sir.

Q. Did it ever occur to you that after receiving the Fidelifacts Report that appropriate thing to do would be to have the Skilled Trades Superintendent call Mr. Malanche in for an interview and see whether the Skilled Trades Superintendent was satisfied as to Mr. Malanche's ability and prior experience as a welder?

A. No, sir.

Q. Were you aware, Mr. Haycraft, that between the period from March 7th of 1973 until October 16th, 1973, American Motors was hiring people as skilled trades

maintenance welders?

FILE MEMO

2/2/73

RE: Robert Malanche
Ind. #45431

On August 7, 1972, this individual applied for a job as a welder and stated he had worked here before.

Upon looking up the old record, it was found he had been discharged for absenteeism on December 10th, 1958. The decision, at that time, was not to re-hire Mr. Malanche.

On February 2nd, 1973, Board Member R. Bilger called me in the morning and asked me why Mr. Malanche had not been considered for a job as a welder. I told Mr. Bilger at that time that Mr. Malanche would be considered along with all other applicants. Later on the same morning, a Mr. Adelman, an attorney from Milwaukee, called me and tried to pressure me into hiring Mr. Malanche. He even went so far as to say he would highly recommend Mr. Malanche and would send a letter of recommendation to Mr. Sladek.

At 1:30 P.M., this date (2/2/73) Mr. Malanche appeared in person at the window of the Employment office asking to see me.

I asked Mr. Malanche to come in and told him he had not been considered for rehire here because of his previous record. At that time Mr. Malanche went into a long diatribe about why he had been terminated from here in the first place. It seems that he has a large chip on his shoulder because of his Mexican descent.

Mr. Malanche states that the Italians in the Local Union would not "go to bat" for him when he was terminated in 1958. He further stated that a Foreman by the name of "Jim Emanuel - Emil or Amo" was the man who got him fired when he was here before. He said he would work with the pipefitters for a while and then this Foreman would send him to the mortex booth scraping mortex until he was filthy and then send him back to work with the fitters again. He further stated that the fitters would hide so that he would be standing around and not working.

Mr. Malanche went on to say that the Foreman would send him out looking for the pipefitters and also told him at the time that if he could not find them on the job he should call this Foreman back from a nearby phone. He said this had occurred a number of times so that he got the feeling the Union thought him to be a "stool pigeon". He went on to say that two Italian fitters "jumped" him on Company premises and tried to beat him up. He reported this to his Foreman and the Foreman told him to leave the Plant and go home; that he would be notified in a couple of days when to return to work. He said that when he did not receive a call from the Foreman he went to the gate and asked for the Foreman. He states that the Foreman would never come out to the gate. The last time this occurred, the Foreman appeared at the gate and told him he no longer worked here.

Mr. Malanche further stated that he talked to Tony Russo and that Mr. Russo told him the same thing.

It is my impression that this man feels he is being persecuted due to his nationality. It seems his only purpose in appearing here

this afternoon was to let someone in the Employment Office know what his past work record was.

/s/

M. J. Schroeder

MJS:Kas

STATE OF WISCONSIN / Department of Industry
Labor and Human
Relations

201 E. Washington Avenue, Madison, Wisconsin

February 4, 1974

Robert Malanche
1503 May St.
Racine, Wisconsin 53404

Dear Mr. Malanche:

On Friday afternoon I finally contacted Mr. Haycraft of AMC. He outlined the things you should do regarding the affidavits. First, you must get them notarized. If you do not it will only delay matters further. He said it would take about ten days to review them, and then they could give you a definite answer. So, go back to the companies involved and get them to give you the affidavits in the required form.

Then, when you get them, send them by certified mail, return receipt requested, to:

Emmit Haycraft
Industrial Relations
American Motors Corporation
5626 Twenty-fifth Avenue
Kenosha, Wisconsin 53140

If, in addition, you are interested in production welding, ask him when you send the affidavits to send you an application for

production welder. He said he could get you to work within 30 days.

Sincerely,

/s/

Robert Junceau

Field Investigator

A. To supervise the activities of the Hourly Employment Office.

Q. And is it true that in that capacity you were responsible for all hiring activity for hourly personnel in the Kenosha Plants?

A. That's correct.

Q. You are familiar with the job classifications in the skilled trades of journeymen, changeover transfer and changeover new.

A. Yes.

Q. Is it true, Mr. Sladek that it was the policy of American Motors between August of '72 and April of '74 to hire a qualified journeyman whenever possible in front of a changeover transfer or a changeover new?

A. That's correct.

Q. And in fact the changeover new applicant would not even be considered un-

less there was not a qualified journeyman available.

A. That's correct.

Q. You are not aware of any -- strike that. Have you had an opportunity to review the Stipulations of Fact that counsel have arrived at in this case?

A. Yes.

Q. Specifically the discussion in that stipulation at

Q. Do you see anything in this report at all that would cause you to question whether he was reliable or dependable?

A. No.

Q. And is it true -- strike that. Pursuant to the collective bargaining agreement between the UAW and American Motors, journeyman status can be established through submission of properly notarized affidavits evidencing eight years of prior experience in that particular trade.

A. Yes.

Q. Is that correct?

A. Um-hmmm.

Q. 23, 24, 26, 28, 29, 30 and 6, you had seen Mr. Malanche's application prior to the receipt of the Fidelifacts Report; is that correct?

A. Yes.

Q. I am showing you what has been marked

as Exhibit 6, which is the Malanche application of August 7, 1972. I'd like you to look at that application and tell me whether you see itemized at least eight years' experience as a maintenance welder on the face of that application.

A. On the face of the application, yes.

Q. I am showing you what has been marked as Exhibits 23,

Q. At your meeting with Mr. Schroeder on February 2nd, 1973, did Mr. Schroeder advise you that you were not going to be rehired at American Motors?

A. Yes.

Q. What was the reason that he gave you?

A. Previous work record. My previous discharge.

Q. Did Mr. Schroeder raise any question with you at all with respect to whether you were a journeyman?

A. No.

Q. Did he at any time question your ability to document your journeyman status?

A. No.

Q. Did he tell you that your application would not be given consideration until such time as you documented your journeyman status?

A. No.

Q. Did anyone from American Motors, and

this could include Schroeder, Sladek, Haycraft, or anyone else, advise you that your application would not be given consideration until such time as you documented your journeyman status?

A. No.

.....

A. Yes, it does.

Q. Do you see anything suspect or unusual about that application which would cause you to doubt whether Mr. Malanche could in fact establish journeyman status?

A. I see no reason for that.

Q. Exhibits 23, 24, 26, 28, 29 and 30. Mr. Daum, I am now showing you what have been marked as Exhibits 23, 23, 26, 28, 29 and 30. I would ask you to review the front page of each of these applications and then indicate to me whether you find itemized on any of the applications at least eight years' experience as a maintenance welder.

(Witness complying,)

A. I don't see any on these papers.

Q. With respect to the hiring procedure at American Motors in the skilled trades between 1972 and 1974, would Emmit Haycraft, as Assistant Director of Indus-

trial Relations, have become involved in reviewing applications for the purpose of deciding whether or not an applicant could or could not establish journeyman status?

A. No.

Q. Who, normally, would make that kind of determination?

A. The Skilled Trades Superintendent involved in the selection, and Schroeder, or whoever was in his place in

No. 80-1401

MAR 18 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT MALANCHE,

Petitioner,

v.

AMERICAN MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HERBERT P. WIEDEMANN
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone (414) 271-2400
Attorney for Respondent
American Motors Corporation

Of Counsel:
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1401

ROBERT MALANCHE,

Petitioner,

v.

AMERICAN MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Robert Malanche, Petitioner herein, worked for American Motors Corporation ("AMC"), Respondent herein, for a month in 1958 and then was discharged on account of absenteeism. In August of 1972, he applied for reemployment as a journeyman maintenance welder, but AMC was not hiring in that classification at that time. It next began such hiring in February of 1973.

The collective bargaining agreement specified that an applicant for the position of journeyman maintenance welder

must provide proof of journeyman status before hiring. With a routine application, it was the practice to interview the applicant first and then to require the documentation. But Malanche did not proceed routinely. In February of 1973, before any interview, he obtained an attorney to represent him and that attorney communicated with AMC representatives on Malanche's behalf. In the course of the communications, still in February of 1973, the attorney stated that he would "try and get some documentation" and would be in touch with AMC "as soon as possible." No documentation was forthcoming, however, and sometime later in 1973 Malanche and the president of the AMC union met with an AMC representative, at which time Malanche again was informed that he needed to document his journeyman status.

In August of 1973, Malanche, a naturalized citizen born in Mexico, filed a charge of employment discrimination based on national origin. After investigation, an employee of the state agency with which that charge was lodged wrote to Malanche advising him to document his journeyman status. Malanche furnished that documentation in February of 1974, AMC then began processing his application and he was thereafter hired in due course.

Malanche filed the complaint in the instant case on April 14, 1976. The assertion in the district court was that AMC was guilty of unlawful discrimination by reason of its delay in hiring him between February of 1973 and February of 1974. The allegation was that AMC had wrongfully deviated from its normal hiring practice by requiring him to prove journeyman welder status prior to any other processing of his application.

AMC asserted two non-discriminatory bases for its deviation: Malanche's previous discharge for absenteeism

and the communications with Malanche's attorney and the union which led AMC to believe the documentation would be furnished by Malanche within a short time.

The district court, citing *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), granted summary judgment for AMC based on its conclusion that the pleadings and affidavits which had been filed established that Malanche did not meet the burden of proof that he was qualified for the job in question prior to February of 1974. This district court decision is reproduced in Respondent's appendix, beginning on page App. 5.

The court of appeals, by unpublished order, vacated and remanded, not because of any disagreement with the district court's application of *McDonnell Douglas* standards, but because it concluded there were disputed factual issues with respect to whether the failure to process Malanche's application before he submitted proof of journeyman status was discriminatory. This decision of the court of appeals is reproduced in the Respondent's appendix, beginning on page App. 1.

Upon remand, the district court found, on the basis of the evidence submitted at a full trial, that Malanche's application was not routine and that, under the circumstances, he did not establish that he was qualified, within the meaning of *McDonnell Douglas,* until proof of his journeyman status ultimately was forthcoming. This decision of the district court is reproduced in Petitioner's appendix, beginning on page 7a.

The court of appeals, in a second unpublished order, which is the order that is the subject of the petition for certiorari herein, affirmed the decision of the district court as having ample support in the record. This decision of the court of appeals is reproduced in Petitioner's appendix, beginning on page 1a.

REASONS WHY THE WRIT SHOULD BE DENIED

In the petition for certiorari, Malanche has presented his reasons why it should be granted under three headings, labeled, respectively, A, B and C. With respect to headings A and B, while the argument is laced with some references to the trial, its thrust is to take issue with the granting of the motion for summary judgment filed by AMC and the denial of the cross motion for summary judgment filed by Malanche. Those motions were filed before trial, and Malanche appealed. He was successful to the extent that the court of appeals, in its first unpublished order, vacated the summary judgment granted to AMC, but he was unsuccessful in his attempt to obtain summary judgment in his favor. The case then proceeded to trial. AMC prevailed and Malanche appealed again, this time challenging not the disposition of the pre-trial motions but rather challenging the district court's subsequent decision based on the trial evidence. The result of this appeal was the second unpublished order of the court of appeals, affirming the district court's post-trial decision. Malanche concedes in the petition for certiorari, at pages 2-3, that it is the second order of the court of appeals, not the first, which is before this Court. In short, the disposition of the pre-trial motions for summary judgment is not now subject to review.

With respect to heading C, Malanche's argument is that the burden of proof imposed upon him was not made clear either by the court of appeals or by any other court. While the thrust of this argument is not entirely clear, it also seems to be addressed to the first order of the court of appeals, rather than to the second, because whatever the court of appeals said in its second decision, issued after the trial, could not have prejudiced Malanche's ability to proceed with the trial. Again, the first order is not now subject to review. And even assuming that the second

order is somehow being questioned, it is in no way inconsistent with *McDonnell Douglas,* as evidenced by the recent opinion of this Court in *Texas Department of Community Affairs* v. *Burdine,* ..... U.S. ....., 49 U.S.L.W. 4214 (U.S. March 4, 1981) (No. 79-1764).

In its present posture, the instant case actually is a mine run example of an oft repeated situation where, in a Title VII[1] proceeding, a trial court applies the principles enunciated in *McDonnell Douglas* to the presentation of evidence and then, guided by those principles, makes a decision based on the evidence presented; the losing party then appeals and the appellate court reviews the trial court's application of the law to the evidence. There is nothing involved which will serve as a basis for invoking the discretionary jurisdiction of this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated this 16th day of March, 1981, at Milwaukee, Wisconsin.

Respectfully submitted,

HERBERT P. WIEDEMANN
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone (414) 271-2400
Attorney for Respondent
American Motors Corporation

Of Counsel:

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Argued October 27, 1978

December 20, 1978.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

ROBERT MALANCHE,

Plaintiff-Appellant,

No. 78-1211 vs.

AMERICAN MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 76 C 258

Myron L. Gordon, *Judge*.

ORDER

In this Title VII case, the district court entered summary judgment for the defendant, American Motors Corporation (AMC), and ordered the plaintiff's action dis-

missed. Malanche, the plaintiff, appeals and requests this court to reverse the judgment of the district court and either remand for a trial on the merits or enter summary judgment for the plaintiff.

Malanche applied for employment as a journeyman welder with AMC on August 7, 1972. AMC offered him employment on June 4, 1974 and he began work the next day. He alleges that AMC's delay in offering him employment was a result of national origin discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* The district court found that AMC applied nondiscriminatory standards to Malanche and that it hired him as soon as he proved his journeyman status as required by the collective bargaining agreement.

Malanche argues in this appeal that he established a prima facie case of discrimination under the standards set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973), and that AMC did not meet its burden of establishing a legitimate, non-discriminatory reason for its action. A prima facie case may be established by showing:

> (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green, id.* The court in *McDonnell* recognized that the necessary proof would vary depending on the facts of the case. *Id.* at n.13. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove a legitimate non-discriminatory reason for its action. *Id.* at 802.

In the present case, we are of the opinion that at least one genuine issue of material fact exists which must be resolved before the *McDonnell* analysis may properly be utilized, and therefore, that summary judgment was inappropriate. AMC, in its response to Malanche's allegations, relied heavily on the fact that it hired him as soon as he documented his journeyman status and that the delay was thus attributable to his failure to submit the documentation properly notarized until February 25, 1974. Although the collective bargaining agreement clearly required that the prospective employee provide such documentation, Malanche alleges that AMC did not follow its typical procedures in processing his application for employment. He contends that AMC typically would not require the documentation until after the applicant had been through a preliminary interview with Merrill Schroeder, the Hourly Placement Coordinator and Interviewer, and a full interview with a skilled trades superintendent, and been found to be qualified by the latter. Malanche, however, was not allowed to proceed beyond the preliminary interview until he submitted the notarized documentation. Malanche supported this allegation with deposition testimony of Larry Sladek, AMC's Hourly Employment Supervisor.

AMC, in response, contends that "in practice [it] observed some flexibility as to when documentation might be required. . . ." Whether or not this flexibility existed, and whether or not AMC exercised this flexibility in a discriminatory fashion, are disputed issues of material fact which can only be resolved by a trial. These are important issues for determining whether Malanche was a qualified appli-

cant[1] for purposes of establishing a prima facie case, and for determining whether AMC could meet its burden of rebutting a prima facie case.

AMC also argues that its delay in hiring Malanche was due to its policy of not hiring persons who have been previously discharged by AMC. AMC asserts that when it was informed of Malanche's good work history subsequent to his initial discharge, which apparently was sufficient to overcome this policy, it would have then considered his application but for his failure at that time properly to document his journeyman status. Again, the factual question of whether AMC discriminated against Malanche by requiring him to provide documentation before it interviewed him becomes critical.

These disputed factual issues, for the same reasons hereinbefore stated, preclude our entering summary judgment for Malanche. We, therefore, vacate the judgment of the district court and remand the case for proceedings consistent with this order.

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[1] Malanche claims discrimination manifested by AMC's delay in hiring him. Therefore, he must prove that he was a qualified applicant at the time he claims that AMC first discriminated against him. If AMC could nondiscriminatorily require documentation *before* granting an applicant a full interview, then submission of such documentation would be an element of being a qualified applicant for purposes of establishing a prima facie case, and Malanche would not have satisfied that element.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT MALANCHE,

Plaintiff,

v. No. 76-C-258

AMERICAN MOTORS CORPORATION,

Defendant.

DECISION and ORDER

Both the plaintiff and the defendant have filed motions for summary judgment. I find that the defendant's motion should be granted and the plaintiff's motion denied.

In his complaint, Mr. Malanche alleges that he was discriminated against in employment in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. He charges that he applied for employment with the defendant corporation. He claims that during the period from 1958 to 1974 he was denied employment even though the defendant hired persons in the same trade who had the same or less qualifications than the plaintiff. The court has before it the pleadings in the case, affidavits of various persons, and numerous discovery depositions. In addition, the court has had the benefit of briefs by both parties.

Mr. Malanche had previously been an employee of the defendant but was discharged on December 10, 1958, for

absenteeism. The defendant contends that his subsequent applications for employment were delayed (1) because of Mr. Malanche's prior employment record with AMC, (2) because from 1970 until early 1973 no journeyman welders were hired by AMC, and finally, because Mr. Malanche failed to supply proof of his journeyman status as a welder until February 25, 1974. After such date and upon his completing the required physical examinations, the plaintiff was offered employment and did, in fact, commence work for the defendant on June 5, 1974.

Thus, it is the defendant's contention that there was no disparate or discriminatory treatment applied in the plaintiff's case. Instead, the defendant urges, the record demonstrates that the plaintiff was not hired because of uniformly applied company policies and because Mr. Malanche was a previously discharged employee who could not be rehired until he offered proof of his journeyman's status. The defendant, with considerable cogency, argues that when the necessary documentation as to Mr. Malanche's journeyman's status was in fact provided in early 1974, the hiring process was then commenced.

While the plaintiff urges that there are certain inconsistencies in connection with the policies claimed to be the "uniform" procedures of the defendant, I find that the record substantially supports its contention that it applied nondiscriminatory standards in Mr. Malanche's case. The present record is so convincing that I am prepared to rule as a matter of law there was no discrimination against the plaintiff on the part of the defendant American Motors Corporation during the period prior to February 25, 1974. It was on that date that Mr. Malanche established his journeyman status and the defendant began the hiring procedure which culminated in Mr. Malanche's return to employment on June 5, 1974.

I find that the defendant has met its burden of showing that there were nondiscriminatory reasons for the initial refusal to rehire Mr. Malanche and also legitimate nondisparate justifications for the delay in rehiring him. On the other hand, the present record establishes that Mr. Malanche has failed to demonstrate that the defendant's conduct concealed either a pattern of unlawful discrimination or unlawful discrimination in his case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); cf. Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977).

Therefore, IT IS ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendant's motion for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 30 day of December, 1977.

/s/ Myron L. Gordon

U. S. District Judge